

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	No. 55564-2-I
Respondent,	)	Linked w/ No. 55590-1-I
	)	
v.	)	UNPUBLISHED OPINION
	)	
SAN KOUAY SAEYANG,	)	
	)	
Appellant.	)	
<hr style="width:45%; margin-left:0"/>		FILED: <b><u>July 31, 2006</u></b>

**PER CURIAM.** -- San Saeyang challenges his convictions of first degree robbery and first degree burglary while armed with a firearm. He argues that the State proved multiple acts of robbery and the trial court failed to give a jury instruction requiring unanimity, contends that the prosecutor's reference to a suppressed firearm in opening statements denied him a fair trial, and raises additional pro se claims in a statement of additional grounds for review. The special unanimity instruction was not required because the crime was a continuing offense, the prosecutor's isolated improper comment did not cause incurable prejudice, and Saeyang's pro se claims are without merit. We affirm.

**FACTS**

Pharat Roeuth invited his friend Nak Ly and an acquaintance, Buntha

Earnng, to his house to play video games. Earnng arrived by himself and told Roeuth that Ly was on his way. After Roeuth invited Earnng inside, Earnng produced a pistol, racked a round into its firing chamber and held the pistol to Roeuth's head. Earnng commanded Roeuth to tell him where he kept his cash, and called another man, unfamiliar to Roeuth, into the apartment. The other man pointed another handgun at Roeuth and Earnng went into Roeuth's bedroom and took Roeuth's hidden cash. While Earnng was in the bedroom, the other man took jewelry Roeuth was wearing. Earnng and the other man left, threatening Roeuth not to involve police. The entire incident took no more than five minutes.

Ly arrived later, and persuaded Roeuth to call police. Based on Roeuth's description and information about Earnng's associates, officers constructed a photographic montage that included a picture of the defendant, San Saeyang. Roeuth immediately identified Saeyang's picture with 100 per cent certainty as the man who had taken his jewelry. Two days later, police located and arrested Earnng in a park and Saeyang in the bedroom of a nearby house. Saeyang was sitting on a bed a short distance away from a shotgun and a bag containing three pistols.

Saeyang was charged with first degree robbery and first degree burglary, each crime alleged to have been committed while armed with a firearm. Earnng received the same charges. The defendants were tried together.

Before trial, defense counsel jointly moved to exclude any reference to

the four firearms found in the bedroom with Saeyang. In response, the prosecutor indicated she did not intend to refer to the shotgun but argued the handguns were relevant in light of the handguns used in the robbery. After discussing a procedure for Roeuth to view the pistols, the court denied the defense motion.

In her opening statement, the prosecutor referred to the shotgun and the three handguns. Neither defense counsel objected at the time, but counsel later jointly moved for a mistrial based on the mention of the shotgun. The court denied the mistrial, noting the jury would receive the standard instruction to disregard unsupported argument, and offered to give an additional specific curative instruction. Counsel for each defendant declined. The shotgun was not mentioned again during the trial in evidence or argument.

The State presented evidence of the entire encounter between Roeuth and the defendants and did not elect to rely on any specific part of the incident to prove the charges. Neither the State nor either of the defendants proposed an instruction requiring the jury to be unanimous about any particular act by either of the codefendants that constituted the robbery and the court gave no such instruction. In addition to identifying each defendant, Roeuth identified one of the three recovered handguns as very similar to the gun Earng used in the robbery. The jury rejected Saeyang's defense that he was misidentified and Earng's alibi defense and found both men guilty. Saeyang appeals.

## DECISION

Saeyang first argues the trial court erred by failing to give a jury instruction requiring jury unanimity as to whether Earnng's act of taking cash or Saeyang's act of taking jewelry established the basis for the robbery charge. Saeyang may raise this issue for the first time on appeal because the failure to give a required unanimity instruction raises an issue of constitutional magnitude. State v. Camarillo, 115 Wn.2d 60, 63 n. 4, 794 P.2d 850 (1990).

A jury unanimity instruction is required where the evidence indicates several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct and the State fails to elect to rely on a specific act. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). A unanimity instruction is not required, however, where the defendant's acts form a continuing course of criminal conduct. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991). The court evaluates a defendant's acts in a common sense manner to determine whether they form one continuing offense. Petrich, 101 Wn.2d at 571. Important factors to consider are whether the conduct occurred at different times and places or against different victims. Petrich, 101 Wn.2d at 571.

Where criminal conduct occurs within a short time, a common sense approach suggests that this exception applies. See, e.g., Crane, 116 Wn.2d at 330. (A series of assaults resulting in fatal injuries occurring over a two-hour

period constituted a continuous course of conduct). Likewise evidence that a defendant engaged in a series of acts intended to secure the same objective, supports a finding that the defendant's conduct was a continuing course of conduct rather than several distinct acts. See State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (forcefully kissing and hitting the victim constituted a continuous offense because both were aimed at the single purpose of having sex with her).

Viewed in a common sense manner, the facts of this case clearly presented a continuing offense. The victim was the same, the critical acts of taking Roeuth's property by threat of force occurred virtually simultaneously, and the evidence strongly suggests the codefendants shared the joint objective of stealing Roeuth's property by threatening him with handguns. Moreover, a jury "need not reach unanimity on whether a defendant acted as a principal or an accomplice." State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). A Petrich instruction was not required and Saeyang's right to a unanimous jury was not violated. Accordingly, we do not address the State's alternative argument that any error was harmless beyond a reasonable doubt.

Saeyang also contends that the prosecutor's improper reference to the shotgun in her opening statement constituted misconduct that deprived him of a fair trial. We disagree.

When prosecutorial misconduct is alleged, the defendant bears the

burden of establishing that the conduct complained of was both improper and prejudicial. State v. Stenson, 132 Wn. 2d 668, 718, 940 P.2d 1239 (1997). Even if a defendant proves that conduct by the prosecutor was improper, the misconduct will not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Brett, 126 Wn. 2d 136, 175, 892 P.2d 29 (1995).

The decision to deny a request for mistrial based upon prosecutorial misconduct lies within the sound discretion of the trial court; an appellate court determines only whether the misconduct, when viewed against the backdrop of all the evidence, so prejudiced the defendant that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Lewis, 130 Wn. 2d 700, 707, 927 P.2d 235 (1996). Whereas here, the court instructs the jury to disregard statements of counsel that were not supported by the evidence, the jurors are presumed to abide by such instructions. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

On this record, Saeyang has not rebutted the presumption that the jury followed the instruction and disregarded the prosecutor's unsupported comment. Saeyang has not challenged the trial court's admission of the evidence of the three handguns, two of which Ro euth believed were not involved in the robbery. Viewed against this evidentiary background, we cannot conclude the prosecutor's isolated sloppy and improper mention of the shotgun was so

prejudicial that the trial court abused its discretion by failing to order a mistrial.

Saeyang's pro se claims also fail. His contention that his sentence exceeds the statutory maximum fails because the applicable statutory maximum for purposes of this analysis is life in prison. RCW 9A.56.200; RCW 9A.20.021(1)(a); See State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005) (applying ten-year statutory maximum). Saeyang's challenge to the firearm enhancement portions of his sentence fails because there was sufficient evidence the firearm he used was operable and there was a sufficient nexus between the firearm and the charged offenses. State v. Schelin, 147 Wn.2d 562, 574, 55 P.3d 632 (2002). Likewise, the trial court did not abuse its discretion or offend the double jeopardy prohibition in employing the anti-merger statute to sentence Saeyang separately for the burglary and robbery offenses. State v. Lessley, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992); State v. Sweet, 138 Wn.2d 466, 475, 980 P.2d 1223 (1999). Having not erred in applying the anti-merger statute, the court correctly ordered the deadly weapon enhancement portions of Saeyang's sentence for his crimes to run consecutively to each other. State v. Husted, 118 Wn. App. 92, 94-96, 74 P.3d 672 (2003), rev. denied, 151 Wn.2d 1014, 89 P.3d 712 (2004).

Affirmed.

FOR THE COURT:

A handwritten signature in black ink, appearing to read "Schindler, ACS", written over a horizontal line.

No. 55564-2-1/8  
Linked w/No. 55590-1-1

Appelwick, G.  
Baker, J.